

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA

Applications for Certification for the	)	Docket Nos.
	)	
Calico Solar (SES Solar One) Project,	)	08-AFC-13,
Genesis Solar Energy Project,	)	09-AFC-8,
Imperial Valley (SES Solar Two) Project,	)	08-AFC-5,
Solar Millennium Blythe Project,	)	09-AFC-6,
Solar Millennium Palen Project, and	)	09-AFC-7,
Solar Millennium Ridgecrest Project.	)	09-AFC-9, and
	)	
Consolidated Hearing on Issues	)	10-CRD-1
Concerning US Bureau of Land	)	
Management Cultural Resources Data	)	
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**REPLY BRIEF OF TESSERA SOLAR NORTH AMERICA, INC.  
ON ISSUES CONCERNING US BUREAU OF LAND MANAGEMENT  
CULTURAL RESOURCES DATA**

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Projects

## **I. INTRODUCTION**

Tessera Solar North America, Inc. (TSNA), the applicant for the Calico Solar and Imperial Valley Solar projects, submits this Reply Brief to address certain arguments made in Intervenor California Unions for Reliable Energy's (CURE's) Brief on Issues Concerning US Bureau of Land Management Cultural Resources Data.

TSNA hopes that the issues between the BLM and CEC will be resolved so that the CEC retains access to BLM's confidential cultural resources information. TSNA submits this Reply Brief only because CURE's Brief asserts that if CEC has no access to precise cultural resources location information, then the CEC will have "no" information upon which to base its own analysis, and will be unable to meet its statutory obligations. CURE argues that if BLM determines that the federal cultural resources laws preclude the sharing of sensitive cultural resources information with interested parties such as CURE and tribal organizations, and apparently even with the general public, then the CEC will be "prohibited" from complying with CEQA, the Warren-Alquist Act, and the CEC's own regulations. CURE's arguments go much too far.

## **II. THE CEC CAN COMPLY WITH ITS LEGAL OBLIGATIONS REGARDLESS OF WHETHER BLM CONTINUES TO AUTHORIZE RELEASE OF SENSITIVE CULTURAL RESOURCE LOCATION DATA TO THE CEC.**

### **A. Compliance With CEQA.**

#### **1. CEQA Acknowledges That Complete Information Is Not Always Available To A Lead Agency.**

If BLM decides to protect cultural resources in a manner that renders some data unavailable to the CEC, that does not mean the CEC cannot comply with its CEQA obligations. CEQA does not demand the impossible. The sufficiency of a CEQA analysis "is to be reviewed in the light

of what is reasonably feasible.” 14 C.C.R. § 15151. The lead agency should make a good faith effort to “find out and disclose all that it reasonably can.” 14 C.C.R. § 15144; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, 40 Cal. 4th 412, 428 (2007). The Supreme Court has stated that the “key word” is “reasonably.” *State Water Resources Control Bd. Cases*, 136 Cal.App.4th 674, 797 (2006). Where analysis is not feasible, it is not required. *Id.* It is very well established that CEQA does not require “what is not realistically possible . . .” *Residents Ad Hoc Stadium Comm’n v. Bd. of Trustees*, 89 Cal. App. 3d 274, 286, 152 (1979).

Moreover, a CEQA analysis is not invalid for failure to include every suggested test or field study. *Association of Irrigated Residents v. County of Madera*, 107 Cal. App. 4th 1383, 1396 (2003); *Society for Cal. Archaeology v. County of Butte*, 65 Cal. App. 3d 832 (1977) (further archaeological surveys recommended by expert were not required).

Even in the very worst case, where the unavailability of data renders an impact too speculative for analysis, the lead agency’s CEQA process is not invalidated. The lead agency must document its “thorough investigation” and conclude its analysis. 14 C.C.R. § 15145; *Anderson First Coalition v. City of Anderson*, 130 Cal. App. 4th 1173, 1178 (2005); *Alliance of Small Emitters/Metals Indus. v. South Coast Air Quality Mgmt. Dist.*, 60 Cal. App. 4th 55, 66 (1997).

Finally, here, substantial evidence has been made available to the CEC regarding the impacts of the solar projects on BLM-managed cultural resources. As TSNA observed in its opening brief, CEQA requires that the CEC make its decisions on the basis of “substantial evidence,” *i.e.*, “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” 14 Cal. Code Regs. § 15384(a). As described further below, absent the precise

locations of each cultural resource, the CEC's analysis still provides "substantial evidence" as defined by CEQA.

**2. Substantial Evidence Has Been Provided Regarding Cultural Resources At The Calico Solar And Imperial Valley Solar Sites.**

CURE asserts that if the CEC does not have continued access to the precise locations of every cultural resource on BLM project sites, then the CEC will have "no" information upon which to base its decisionmaking. This statement is hyperbole. The Staff Assessments for both the Calico Solar and Imperial Valley Solar projects provide extensive information regarding the results of cultural resources surveys, including the number, nature, and general locations of these resources. See Calico Solar Project SA/DEIS, Chapter 3 and Appendix A; Imperial Valley Solar Project SA/DEIS, Chapter 3. While acknowledging that more precise and extensive surveys continue, both documents identify significant impacts and identify mitigation measures.

**3. CEQA Does Not Impose Special Requirements That Cannot Be Met Absent Confidential Data.**

CURE asserts, with no citation to authority, that CEQA, unlike NEPA and the federal cultural resources statutes, requires that "100% of a project site must be surveyed to inventory cultural resource sites. Subsequently, test excavations are conducted to determine the significance of each site." CURE Brief at 20. There is no such requirement anywhere within CEQA. The type of analysis of impacts that is required under CEQA is determined by what analysis is reasonably feasible and the nature of the project. 14 C.C.R. §§ 15144 , 15146, 15151.

In *Society for California Archaeology v. County of Butte*, 65 Cal.App. 3d 832 (1997), the Court of Appeal specifically addressed archaeological testing and rejected the argument that more testing was required if it would result in a better evaluation of the "true environmental and

archaeological impact.” *Id.* at 837. The court held that “[j]ust as an agency has the discretion for good reason to approve a project which will admittedly have an adverse environmental impact, it has discretion to reject a proposal for additional testing or experimentation.”

CURE next asserts, again without citation to authority, that the “identification and analysis of significant impacts is more stringent under CEQA” than under NEPA and the NHPA. CURE Brief at 21-22. Not only is this claim unsupported; it ignores the long list of federal cultural resources statutes, regulations and executive orders with which BLM must comply in addition to NEPA and the NHPA. *See* BLM Manual 8100 – The Foundations for Managing Cultural Resources (2004).

Finally, CURE claims that CEQA obligates the CEC to “*require* mitigation measures sufficient to minimize, reduce, or avoid the impact or to rectify or compensate for that impact.” CURE Brief at 19. As TSNA’s opening brief notes, however, CEQA recognizes that a lead agency may lack jurisdiction to “require” mitigation, and that is precisely the situation the CEC faces with respect to mitigation on BLM lands.

#### **B. Compliance with the Warren-Alquist Act**

CURE asserts both that the BLM is not complying with section 106 of the NHPA in its responses to Tribes’ requests for information (CURE Brief at 8) and that without all sensitive cultural resources information, the CEC will be unable to find that the Imperial Valley Solar Project complies with section 106 (CURE Brief at 18). Therefore, according to CURE, the CEC will be unable to make the required Warren-Alquist finding that the project complies with “LORS.” The Warren-Alquist Act, however, recognizes a distinction that CURE does not—the difference between local and federal authority.

The statutory definition of LORS does not include federal law. Section 25525 of the Public Resources Code, cited by CURE, in fact states:

The commission may not certify a facility contained in the application when it finds, pursuant to subdivision (d) of Section 25523, that the facility does not conform with any applicable *state, local, or regional* standards, ordinances, or laws, unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity.

Pub. Res. Code § 25525 (emphasis supplied). Throughout the Warren-Alquist Act, LORS are treated differently from federal law requirements, presumably in recognition of federal supremacy. Thus: a) the LORS override described in section 25525 does not apply to federal laws; b) the consultation effort required to resolve a LORS inconsistency (and thus avoid the need for an override) does not apply to federal law (§ 25523(d)(1)); and c) a Commission certificate is “in lieu of any ... state, local, or regional” permit, but can be in lieu of a federal permit only “to the extent permitted by federal law.” (§ 25500)<sup>1</sup> Because Commission authority supplants local, regional and state authority, the Warren-Alquist Act provides a procedure for resolving, and if necessary overriding, identified inconsistencies with LORS.

Because Commission authority cannot supplant federal authority, the Act’s provisions regarding federal law are different. The Act requires the Commission to make findings whether a project complies with federal standards or laws (§ 25523(d)(1)). Unlike for LORS, however, the Act makes no provision for resolution of any disagreements between the Commission and a federal agency regarding the interpretation of federal laws applicable to the federal agency’s action on a project. CURE addresses this silence by inviting the Commission to pay *less* deference to a

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<sup>1</sup> For projects on BLM lands, a Commission certificate is “in lieu of” BLM permits to no extent.

federal agency's interpretation of the laws that agency is charged with implementing than the CEC must pay to a local agency. CURE would have the Commission independently interpret and apply the multiple federal statutes, regulations and Executive Orders governing BLM's treatment of cultural resources on BLM-administered lands; afford no deference to the BLM's interpretation and application; and, because the Commission cannot override BLM's interpretation, simply deny any AFC where the Commission decides BLM is misinterpreting federal law.

TSNA submits that CURE's position both turns federal supremacy on its head and invites the Commission to take on a far greater burden than Warren-Alquist contemplates. When reviewing another agency's determinations regarding LORS compliance, those determinations are always entitled to deference. 20 C.C.R. § 1744(e). When reviewing BLM determinations regarding federal cultural resource requirements on federal lands, the BLM's determinations are entitled to great deference. There is no conundrum here. The Commission can and should defer to the BLM on determinations regarding federal cultural resource requirements.

### **C. Compliance with CEC Regulations**

CURE argues that the CEC would violate its own regulations if it proceeded without full access to all sensitive cultural resources data and that the CEC cannot rely on BLM's work on cultural resources. As TSNA noted in its opening brief, however, CEC regulations expressly discourage the CEC from duplicating the work of other agencies. The regulations require CEC staff to "focus on those environmental matters not expected to be considered by other agencies" and to "monitor" the other agencies' assessments of environmental factors the other agencies are addressing. 20 C.C.R. §§ 1742(c), 1742.5. The full duplication of effort that CURE demands is precisely contrary to these regulations.

### **III. SENSITIVE CULTURAL RESOURCES LOCATION DATA SHOULD NOT BE INCLUDED IN THE CEC'S STAFF ASSESSMENTS OR OTHER DOCUMENTS AVAILABLE TO THE GENERAL PUBLIC.**

Despite its claims that it understands the need to keep sensitive cultural resources information confidential, CURE suggests that any Staff Assessment that does not provide such information is defective. CURE Brief at 2. This is incorrect.

For example, the Imperial Valley Solar Project Staff Assessment provided extensive cultural resources information. It reported 337 cultural resources, their types, their locations by project area (*e.g.*, Phase 1, Phase II, Access Road or Water Supply Line 100 ft. Corridor). Imperial Valley Solar Project SA/DEIS, Tables 6-7. In a 152-page analysis that also noted ongoing detailed surveys, the SA/DEIS concluded that the project's impact would be significant and referred to the BLM's Programmatic Agreement process, to which the CEC is a party, to provide mitigation for the impact.<sup>2</sup>

As is standard practice under CEQA, the SA/DEIS did not pinpoint the locations of the surveyed cultural resources. This information is kept confidential to avoid vandalism and looting. It could be argued that the public is thus deprived of relevant information, and that the lead agency loses the benefit of the public's suggestions for mitigation measures and project alternatives that could arise from dissemination of precise location information. The tradeoff for this compromise is,

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<sup>2</sup> In addition to the SA/DEIS, the CEC's record includes more than 300 pages of publicly available cultural resources data, as follows:

Exhibit 1: AFC, Volume I and II (June 6, 2008) 60 pages  
Exhibit 6: Data Adequacy Supplement (Sept. 26, 2008) 92 pages  
Exhibit 9: CEC/BLM DR Responses 1-3, 5-10, 14-15, 24-26, 31-32, 36-38, 44, 111-127 (March 19, 2009) 95 pages  
Exhibit 13: CURE DR Responses 1-143 (June 6, 2009) 7 pages  
Exhibit 14: Supplement to AFC (June 12, 2009) 10 pages  
Exhibit 19: CEC/BLM DR Responses 142-150 (Oct. 17, 2009) 35 pages  
Exhibit 27: Additional Information Related to SWWTF Improvements (Feb., 26, 2010) 7 pages  
Exhibit 28: Applicant's Comments in the SA/DEIS (March 12, 2010) 8 pages  
Exhibit 32: Supplement to the AFC (May 5, 2010) 13 pages  
Exhibit 38: Applicant's Proposed Revisions to Conditions for Certification (May 17, 2010) 1 page.



however, that the CEQA process does not result in the wanton destruction of the very resources that both CEQA and the cultural resources laws seek to protect. In no reported CEQA case has this practice—the withholding of specific cultural resources location information from the public—been challenged, much less invalidated.

#### **IV. THE CEC CAN COMPLY WITH ITS LEGAL OBLIGATIONS REGARDLESS OF WHETHER BLM AUTHORIZES RELEASE OF SENSITIVE CULTURAL RESOURCE LOCATION DATA TO INTERESTED PARTIES.**

As explained above, the CEC can meet its statutory obligations even if the BLM declines to share precise location data for sensitive cultural resources with the CEC. Moreover, even if it obtains such information, the CEC should not provide such data to the general public. Therefore, CURE’s only claim is that if BLM provides the data to the CEC, the CEC must be allowed to share that data with “parties” to the AFC proceeding, and that if the CEC is prohibited from doing so, that is in itself a violation of law. This assertion is also incorrect.

TSNA, of course, does not dispute that an intervenor is a party. 20 C.C.R. § 1207(c). Citing Public Resources Code section 21081.5, CURE argues that any party must have access to any evidence in the record, but that CEQA provision says only that the Commission’s decision must be based on substantial evidence. TSNA is not aware of any provision that would prevent the Commission from considering sensitive cultural resources data *in camera*. Title 20, section 1212(c) of the Code of Regulations makes the right of parties to rebut evidence in the record “[s]ubject to the exercise of the lawful discretion of the presiding committee member.” The presiding member has discretion to regulate the conduct of the proceedings and hearings. 20 C.C.R. § 1203(c). No regulation makes the right of cross examination absolute. However, keeping in mind that the Commission has a liberal intervention policy, if it were the law that every party has an unconditional right of access to all evidence the Commission has considered,

this would only support the argument that the Commission should not receive sensitive cultural resources data.

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